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Tanasilan a/l Nakethiran v Public Prosecutor & Ors

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–159–06 OF 2021
ROZ MAWAR JC
8 JUNE 2022

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Criminal Procedure — Habeas corpus — Application for — Applicant arrested and detained under Security Offence (Special Measures) Act 2012 ('SOSMA') — Applicant subsequently charged under Penal Code — Whether detention lawful — Whether there was failure to inform applicant of reason for arrest — Whether failure to gazette resolution resulted in provision being null and void — Whether applicant denied right to counsel — Whether application for writ of habeas corpus academic as applicant no longer detained — Security Offences (Special Measures) Act 2012 s 4(2) & (5)

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The applicant was arrested on 20 June 2021 under s 4(1) of the Security Offences (Special Measures) Act 2012 ('the SOSMA'). A subsequent detention was ordered under s 4(5) of the SOSMA until 17 July 2021. The applicant then filed an application for a writ of habeas corpus. In the meantime, the applicant was charged at the sessions court under s 130V(1) of the Penal Code read together with the SOSMA. On 26 August 2021, at the hearing of the habeas corpus application ('the said application'), the High Court dismissed the said application by reason of it being academic. The applicant, however, filed an appeal to the Federal Court against the decision of the High Court whereby the Federal Court allowed the appeal and set aside the High Court's decision. The said application was then returned to the High Court to be heard on its merits. There were two decisions to be made in the High Court: (a) whether the writ of habeas corpus should be granted; and (b) the effect of the writ if it was granted. The respondents implored the court to refuse the said application as the prayer for the issuance of habeas corpus had become obsolete since the applicant was no longer under detention premised on the preventive law of the SOSMA. The respondents also submitted that the corpus was no longer there for a writ of habeas corpus to be issued unto on the ground that the applicant was no longer detained under s 4(5) of the SOSMA but was currently under the court's jurisdiction when bail was refused pending trial this month for the offence under s 130V of the Penal Code and was in remand. The issues that arose for determination were: (i) whether there was a failure to inform the applicant of the reason for his arrest; (ii) whether the failure to *gazette* the resolution resulted in s 4(5) of the SOSMA being null and void; and (iii) whether there was a denial of the applicant's right to counsel pursuant to s 5(1)(b) and 5(2) of the SOSMA.

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Held, dismissing the application:

(1) The *borang pemberitahuan tangkapan* (RAJ1) showed that there were no grounds stated therein reasoning the applicant's arrest. This supported the applicant's contention that he was not informed the grounds of his arrest as required by s 4(2) of the SOSMA. In the premises, this failure on the part of the respondents to inform the applicant the grounds for his arrest as required by s 4(2) of the SOSMA resulted in the said detention order being unlawful (see paras 9–10 & 15).

(2) The applicant's argument that the failure to *gazette* the resolution passed by Parliament ceased the effect of s 4(5) of the SOSMA was not accepted by the court. The requirement under s 4(11) of the SOSMA was for a review and a resolution by Parliament. This was done according to law in April 2017 by both houses in our Parliament. To *gazette* a resolution was for public notification of the effective date of the said law. It did not invalidate the lawful passing of the resolution and its effect in law. In any event, s 4(5) of the SOSMA was invoked on the applicant in June 2021 where it was valid, the expiry being 30 July 2022. This was also well before 23 March 2022 when Parliament had tabled and decided not to approve the motion to extend the effective period of s 4(5) of the SOSMA (see paras 16–17).

(3) The court did not see any breach of behalf of the respondents in denying the applicant's right to counsel. The inability of the consultations of the applicant with his legal counsel stemmed from the conflicting court schedule of the latter and the applicant contracting the COVID-19 virus. Up until the application for a writ of habeas corpus was filed, there was no instance where the applicant was refused right to legal consultation and there were no positive overt actions by the respondents to stop/hinder/deny access to the applicant's legal counsel. As such, the court did not find it tantamount to denying the applicant of the right to legal consultation. There was no breach of s 5(1)(b) of the SOSMA (see paras 24–25 & 27).

(4) There was no further detention under the SOSMA as the applicant was charged under s 130V of the Penal Code and was currently in remand pending trial. The appellant was no longer under preventive detention of the SOSMA. The applicant was being accorded a fair open trial under the criminal justice system. He was given the right to be heard and to present his defence. The effect of the court's finding that the detention under the SOSMA was unlawful wherein the writ of habeas corpus lay, may be inoperable. As the current remand of the applicant was no longer under the preventive law of the SOSMA, but as an accused person under the Penal Code, Criminal Procedure Code, the release and granting of freedom of the applicant must be through the legal channel now

applicable under the Criminal Procedure Code and/or other appropriate laws, but not through a writ of habeas corpus, in terms of bail pending trial (see paras 36 & 38–39).

[Bahasa Malaysia summary

Pemohon telah ditangkap pada 20 Jun 2021 di bawah s 4(1) Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('AKKLK'). Penahanan selanjutnya telah diperintahkan di bawah s 4(5) AKKLK sehingga 17 Julai 2021. Pemohon kemudian memfailkan permohonan untuk writ habeas corpus. Dalam pada itu, pemohon telah didakwa di mahkamah sesyen di bawah s 130V(1) Kanun Keseksaan yang dibacakan bersama dengan AKKLK. Pada 26 Ogos 2021, semasa pendengaran permohonan habeas corpus ('permohonan tersebut'), Mahkamah Tinggi menolak permohonan tersebut kerana ianya bersifat akademik. Pemohon, bagaimanapun, memfailkan rayuan kepada Mahkamah Persekutuan terhadap keputusan Mahkamah Tinggi yang mana Mahkamah Persekutuan membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi. Permohonan tersebut kemudiannya dikembalikan ke Mahkamah Tinggi untuk didengar berdasarkan meritnya. Terdapat dua keputusan yang perlu dibuat di Mahkamah Tinggi: (a) sama ada writ habeas corpus harus dibenarkan; dan (b) kesan writ tersebut sekiranya ia dibenarkan. Responden memohon mahkamah menolak permohonan tersebut kerana prayer untuk pengeluaran habeas corpus telah menjadi lapuk kerana pemohon tidak lagi ditahan berdasarkan undang-undang pencegahan AKKLK. Responden juga berhujah bahawa corpus tersebut tidak lagi wujud untuk writ habeas corpus dikeluarkan atas alasan bahawa pemohon tidak lagi ditahan di bawah s 4(5) AKKLK tetapi kini berada di bawah bidang kuasa mahkamah apabila ikat jamin tidak diberikan sementara menunggu perbicaraan bulan ini atas kesalahan di bawah s 130V Kanun Keseksaan dan ditahan reman. Isu-isu yang timbul untuk ditentukan adalah: (i) sama ada terdapat kegagalan untuk memaklumkan pemohon alasan penahanannya; (ii) sama ada kegagalan untuk mewartakan resolusi tersebut menyebabkan s 4(5) AKKLK adalah terbatal dan tidak sah; dan (iii) sama ada terdapat penafian hak pemohon untuk mendapatkan peguam menurut s 5(1)(b) dan 5(2) AKKLK.

Diputuskan, menolak permohonan:

(1) Borang pemberitahuan tangkapan (RAJ1) menunjukkan bahawa tiada alasan yang dinyatakan di dalamnya untuk alasan penahanan pemohon. Ini menyokong dakwaan pemohon bahawa beiau tidak dimaklumkan alasan penahanannya seperti yang dikehendaki oleh s 4(2) AKKLK. Di dalam premis ini, kegagalan pihak responden untuk memaklumkan pemohon alasan penahanannya seperti yang dikehendaki oleh s 4(2) AKKLK menyebabkan perintah penahanan tersebut adalah menyalahi undang-undang (lihat perenggan 9–10 & 15).

(2) Hujah pemohon bahawa kegagalan mewartakan resolusi yang diluluskan oleh Parlimen menghentikan kesan s 4(5) AKKLK tidak diterima oleh mahkamah. Keperluan di bawah s 4(11) AKKLK adalah untuk semakan dan resolusi oleh Parlimen. Ini telah dilakukan mengikut undang-undang pada April 2017 oleh kedua-dua dewan di Parlimen kita. Untuk mewartakan resolusi adalah untuk pemberitahuan awam mengenai tarikh kuatkuasa undang-undang tersebut. Ia tidak membatalkan pengesahan resolusi yang sah dan kesannya dalam undang-undang. Walau apapun, s 4(5) AKKLK telah digunakan ke atas pemohon pada Jun 2021 di mana ia sah, tempoh tamatnya adalah pada 30 Julai 2022. Ini juga sebelum 23 Mac 2022 apabila Parlimen telah membentangkan dan memutuskan untuk tidak meluluskan usul untuk melanjutkan tempoh efektif s 4(5) AKKLK (lihat perenggan 16–17).

(3) Mahkamah tidak melihat sebarang pelanggaran bagi pihak responden dalam menafikan hak pemohon untuk mendapatkan peguam. Ketidakupayaan perundingan pemohon dengan peguamnya berpunca daripada jadual mahkamah yang bercanggah dengan pemohon yang dijangkiti virus COVID-19. Sehingga permohonan untuk writ habeas corpus difailkan, tidak ada contoh di mana pemohon ditolak hak untuk mendapatkan perundingan undang-undang dan tidak ada tindakan nyata positif oleh responden untuk menghentikan/menghalang/menolak akses kepada penasihat undang-undang pemohon. Oleh itu, mahkamah tidak mendapati ia sama dengan menafikan hak pemohon untuk perundingan undang-undang. Tiada pelanggaran s 5(1)(b) AKKLK (lihat perenggan 24–25 & 27).

(4) Tiada penahanan lanjut di bawah AKKLK kerana pemohon telah didakwa di bawah s 130V Kanun Keseksaan dan kini dalam reman sementara menunggu perbicaraan. Perayu tidak lagi berada di bawah tahanan pencegahan AKKLK. Pemohon telah diberi perbicaraan terbuka yang adil di bawah sistem keadilan jenayah. Dia diberi hak untuk didengar dan mengemukakan pembelaan. Kesan daripada keputusan mahkamah bahawa penahanan di bawah AKKLK adalah menyalahi undang-undang di mana writ habeas corpus diletakkan, mungkin tidak boleh digunakan. Memandangkan tahanan reman semasa pemohon tidak lagi di bawah undang-undang pencegahan AKKLK, tetapi sebagai orang tertuduh di bawah Kanun Keseksaan, Kanun Tatacara Jenayah, pembebasan dan pemberian kebebasan pemohon mestilah melalui saluran undang-undang yang kini terpakai di bawah Kanun Tatacara Jenayah dan/atau undang-undang lain yang sesuai, tetapi tidak melalui writ habeas corpus, dari segi jaminan sementara menunggu perbicaraan (lihat perenggan 36 & 38–39).]

Cases referred to

Jayaganesan a/l Ramakrishnan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 697; [2019] 9 CLJ 725, FC (refd)

Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177, FC (distd)

SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (folld)

Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 1; [2019] 9 CLJ 177, FC (refd)

Legislation referred to

Criminal Procedure Code

Federal Constitution art 5(2)

Penal Code s 130V

Security Offence (Special Measures) Act 2012 ss 4(1), (2), (5), (11), 5(1)(a), (1)(b), (2)

Jay Moey Wei Jiun (Jayarubbiny Jayaraj) for the applicant.

Farah Edzlin Yusof (with Muhammad Sinti and Anasuha Atiqah Mat Saidi) (Attorney General's Chambers) for the respondent.

Roz Mawar JC:

[1] In deciding whether a writ of habeas corpus should be issued for this application, the route journeyed needs to be taken into consideration. After the applicant's arrest on 20 June 2021 under s 4(1) of the Security Offence (Special Measures) Act 2012 ('the SOSMA'), a subsequent detention was ordered under s 4(5) of the SOSMA until 17 July 2021. The chronology thereafter is as follows:

(a) 28 June 2021 — the applicant filed an application for a writ of Habeas Corpus at the Kuala Lumpur High Court;

(b) 13 July 2021 — the applicant was charged before the Kuala Lumpur Session Court under s 130V(1) of the Penal Code read together with SOSMA;

(c) 26 August 2021 — at the hearing of the said application, the Kuala Lumpur High Court dismissed it ruling that the said application was then rendered academic;

(d) 3 September 2021 — the applicant filed an appeal to the Federal Court against the decision of the High Court; and

(e) 11 January 2022 — the Federal Court allowed the appeal and set aside the High Court's decision. The said application was then returned to the High Court to be heard on its merits.

[2] Pertinent to note is that the respondents had sought for a clarification from the Federal Court at the hearing as to the effect of the writ of habeas corpus if the High Court were to allow it. The ruling by the Federal Court was that the said issue was for the High Court to make a finding.

[3] Thus before this court there are two decisions to be made — whether to grant the writ of habeas corpus and the effect of it should it be granted.

[4] The learned senior federal counsel for the respondents implored this court to refuse this said application as the prayer for the issuance of habeas corpus has become obsolete since the applicant is no longer under detention premised on the preventive law of SOSMA. The respondents submitted that the corpus is no longer there for a writ of habeas corpus to be issued unto.

[5] The respondents' position is that they no longer detain the applicant under s 4(5) of the SOSMA but he is currently under the court's jurisdiction when bail was refused pending trial this month for the offence under s 130V Penal Code and is in remand.

[6] This will be addressed but this court's first obligation is to assess the legality of the applicant's preventive detention itself as filed on 28 June 2021, the Federal Court's decision in *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177 is binding:

> The High Court's constitutional duty to assess the legality of any detention — especially preventive detention — started from the date of filing of the habeas corpus application. The jurisdiction of the High Court or a High Court judge was not determined by the fact of physical detention but the legality of the detention itself. Viewed in this was and giving art 5(2) of the FC its fullest effect, the fact that the detenu was, subsequent to the date of the filing of his application, preventively detained did not vitiate his right to judicial scrutiny over the legality of his initial detention. Similarly, the fact that the detenu was released after the date the application was filed, but before the return of hearing date, did not affect the jurisdiction of the court to review the legality of the detention being challenged. The fact that the detenu was under detention during the hearing but released after an appeal to the Federal Court was filed, did not render the application 'academic'. In relation to the first set of applications, the fact that the detention was one under s 19 of the POCA, rather than s 4(1)(a) of the POCA, did not render the applications academic, as at the date of the filing of applications, the appellants were indeed detained under s 4(1)(a) of the POCA. Moreover, the applications specifically sought release from detention under the provisions of ss 3, 4 and any other provisions of the POCA. That, in itself, warranted the court inquiring into the matter in view of its mandatory constitutional duty of review under art 5(2) of the FC. The HCJ erred in law in failing to undertake the review and in holding that it was academic. With respect to the second set of application, the fact that they are now free from detention under the POCA in no way precluded them from

challenging the decision of the High Court on the issue. A

HABEAS CORPUS APPLICATION

[7] There are three issues raised by the applicant: (a) failure to inform him of the reason for arrest; (b) failure to *gazette* the resolution resulted in s 4(5) Security Offences (Special Measures) Act 2012 ('the SOSMA') null and void; and (c) denial of his right to counsel pursuant to s 5(1)(b) and 5(2) of the SOSMA. B

Failure to inform applicant reasons for arrest C

[8] It is mandated by the law under s 4(2) of the SOSMA that the applicant shall be informed as soon as may be the grounds of his arrest. The applicant, in contending this failure by the applicant, referred to his mother's affidavit who maintained they were both not informed of the reasons for arrest. At the opposite, the respondents maintained that the applicant was indeed informed of the reasons for his arrest. D

[9] In challenges on the legality of the detention like these, the respondents carry the burden to satisfy this court that the said mandatory requirement was discharged (*SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705). It is noted that the *Borang Pemberitahuan Tangkapan* exhibited as RAJ1 in the affidavit of the arresting officer Inspector Raboni ak Jistin showed that there were no grounds stated therein reasoning the applicant's arrest. E F

[10] Though RAJ1 may not be a statutory form and not required to be served on the applicant as submitted by the respondents — it is a piece of evidence that assists in determining the probability of the truth of the contradictory versions of the applicant and the respondent. It was acknowledged by both the arresting officer and the applicant as evident by their signatures and the date of the arrest. Thus, this supports the applicant's contention that he was not informed the grounds of his arrest as required by s 4(2) of the SOSMA. G H

[11] Other documents that are dated with the same date ie 20 June 2021 are exhibited as KRR1 and KRR2. One of them is *Pemberitahuan Waris Kadim Mengenai Tangkapan* which is notification to the applicant's mother that stated specifically the grounds of arrest and the offence he was investigated under. Even though the respondents are not obligated under s 5(1)(a) of the SOSMA to inform the next of kin of the grounds of arrest, the said form dated 20 June 2021 had stated such. So, on the issue of whether the applicant's mother has I

knowledge of the arrest and the grounds for the same, this court finds in the affirmative.

[12] However, none of the other forms signed by the applicant on that date of arrest stated the grounds for his said arrest. With the exception of an averment by the arresting officer that the basis of the arrest was informed orally, there is no other evidence to support the respondents' version.

[13] The slew of authorities held that when challenges are mounted toward the legality of a preventive detention, the burden lies on the detaining authority to show that the detention is legal. Furthermore, the settled law maintains that the applicant is entitled to take advantage of any technical defect which has the effect of invalidating the detention — *Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 1; [2019] 9 CLJ 177 and *Jayaganesan a/l Ramakrishnan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 697; [2019] 9 CLJ 725.

[14] This court is guided by the Federal Court's decision in *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705 on the point that what was averred by the respondents differ from RAJ1 which supports the applicant's contention that the basis of the arrest was not informed. As upheld in that case, this court is entitled to rule that the burden of proof the part of the respondents have not been discharged, and that the inference more favourable to the applicant must be drawn.

[15] In the premises, this failure on the part of the respondents to inform the applicant the grounds for his arrest as required by s 4(2) of the SOSMA results in the said detention order being unlawful.

Failure to gazette

[16] This court does not accept the arguments by the applicant that the failure to *gazette* the resolution passed by Parliament ceased the effect of s 4(5) of the SOSMA. The requirement under s 4(11) of the SOSMA is for a review and a resolution by Parliament. This was done according to law in April 2017 by both houses in our Parliament.

[17] To *gazette* a resolution, as demonstrated by the case laws relied on by the applicant, is for public notification of the effective of the said law. It does not invalidate the lawful passing of the resolution and its effect in law. In any event, s 4(5) of the SOSMA was invoked on the applicant in June 2021 where it is valid, the expiry being 30 July 2022. This is also well before 23 March 2022 when Parliament had tabled and decided not to approve the motion to extend

the effective period of s 4(5) of the SOSMA.

Denied right to counsel

[18] The applicant alleges that the respondents had denied his right to counsel. What this court can gather from the documents and affidavits is this — there is a *Surat Pemberitahuan YBGK/Peguam Pilihan Sendiri* (one of the exhibits in KRR1) for the applicant filled up by the investigating officer on the day of his arrest at 12.50pm. It has the applicant's personal details, date of the arrest and the time of 7.07am and the law under which the applicant was being investigated for — s 130V of the Penal Code.

[19] There is also an authorisation to delay the applicant's consultation with a legal practitioner for 48 hours. The process and procedure for this seem regular from the averments by the respondents and the corroborating forms such as exhibited in KRR1 and KRR2. The said delay as allowed under s 5(2) of the SOSMA would bring the date to 22 June 2021.

[20] A letter dated 21 June 2021 confirmed the appointment of counsel who had sought to meet the applicant on 23 June 2021 but a subsequent letter of 24 June 2021 showed that the meeting with the applicant had to be postponed to 25 June 2021 due to counsel's schedule. The letters are exhibited as MWJJ1.

[21] There is also a letter from the investigating officer dated on 24 June 2021 confirming the said meeting as acknowledged by the applicant's counsel (exh FA3). Until this point, this court finds that the respondents had not denied the applicant of his right to counsel.

[22] On 25 June 2021 the meeting between counsel and the applicant could not materialise as the applicant was a close contact and had to undergo quarantine. In reality, the applicant had himself contracted COVID-19 virus. This information and the ten day quarantine period were made known to the applicant's counsel. He was brought to Pusat Kusta Negara in Sg Buloh and was scheduled to be in quarantine for ten days.

[23] On 28 June 2021 applicant's counsel confirmed all of the above and sought for meeting with the applicant to be conducted via Zoom application or alternatively via telephone. On the same day, this application for a writ of habeas corpus was filed.

[24] Assessing the facts at this juncture of 28 June 2021 this court does not see any breach on behalf of the respondents in denying the applicant's right to counsel. The inability of the consultations with his legal counsel stemmed from

the conflicting court schedule of the latter and the applicant contracting the COVID-19 virus with immediate action and procedure in place upon those suffering from the virus.

[25] Up until the application for a writ of habeas corpus was filed, there is no instance where the applicant was refused right to legal consultation. Looking further, the legal counsel had only reverted to the respondents on 12 July 2021 seeking status even though it was within their knowledge that the applicant was only to have been quarantined for ten days. This court struggles to find anything to suggest that the respondents had denied the applicant's access to counsel. There are no positive overt actions by the respondents to stop/hinder/deny access to the applicant's legal counsel. In fact, on the other hand, had assisted by allowing the applicant medical treatment and isolation according to the law and rules prevalent at that time when he had contracted the COVID-19 virus.

[26] On the matter of the applicant's counsel's request to consult by way of alternative means such as Zoom application during the time the applicant had contracted and was suffering from the COVID-19 virus at Pusat Kusta Negara in Sg Buloh, this court takes judicial notice that at that time during the height of the pandemic, the hospitals were focused on treating the patients to ensure the symptoms do not worsen with their very limited resources, and did not, even if the applicant was fit enough to respond by way of such communication, have such facilities to offer. During that time when the country was just starting to roll out its vaccination program, COVID-19 brought unfortunate fatalities.

[27] In the said circumstances, this court does not find that it tantamount to denying the applicant of the right to legal consultation. The applicant's counsel could have reverted to the respondents after the quarantine period but had only done so much later on 12 July 2021. This court rules that there is no breach of s 5(1)(b) of the SOSMA.

[28] This court is discharging its duty to inquire into the legality of the detention as at 28 June 2021 as the preceding events do not deny the applicant the right to have his said complaint heard. The jurisdiction of this court to issue the writ of habeas corpus stems from art 5(2) of the Federal Constitution and does not derive from the fact of physical detention under the preventive law. This is faithful to the Federal Court's decision in *Lei Meng* at concluded at para 40 of the said judgment:

> To that end, the point of time at which the complainant makes or files the complaint is crucial, as the court is bound to consider whether the detention is unlawful or lawful at the time when the application for habeas corpus was made.

[29] In determining its legality, this court assesses all facts until the date of the filing of the application, regardless of the position of the applicant on the return date and the hearing of the arguments. On the law and the facts, the detention is unlawful as there was a transgression of mandatory right and procedure in not informing the applicant of the grounds of his arrest.

EFFECT OF THIS COURT'S FINDING

[30] Next is to address the effect of such decision. In arriving at this hearing before this court, the applicant was (after the filing of this application and before the 28-day period detention expired) charged under s 130V of the Penal Code on 13 July 2021. The applicant is now in remand pending his trial this month. Thus, the applicant is now no longer under preventive detention.

[31] In assessing the remedy of habeas corpus in our jurisdiction, the Federal Court in *Lei Meng* considered amongst others, the scenario where an applicant may be further detained under the preventive laws or even released. It was decided at paras 87–90 that:

> The full and proper constructions to be afforded to art 5(2) of the FC is that the court looks at the application as if it were a s 4(1) of the POCA detention, and if such detention is tainted, then it follows that any other detention ensuing from it, must be similarly tainted, because they both stem from the same series of transactions under the same legislation, namely POCA. The fact that the initial remand and detention was tainted cannot be ignored or swept under the carpet, allowing for continued detention under separate but related provisions of POCA. This is evident from a perusal and construction of PCA in its entirety, where it may be noted that it comprises a series of mandatory or imperative provisions which have to be complied with prior to proceeding on to the subsequent bases for such preventive detention. The sections are all predicated on each other, such that it is not possible to read each section as comprising a complete and entire basis for the initial or continued detention of the detainees.
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> In short, POCA is not a legislation providing for a series of truncated detentions. Each segment of the detention under POCA is related to the former. The net consequence is that nay subsequent action taken to place the detainee under a new or separate form of detention, or even to release the detainee, does not undermine or stultify the court's express duty to scrutinise the earlier detention with a view to satisfy itself that such earlier detention is indeed legal and valid under the relevant preventive laws.

[32] Thus the subsequent preventive orders cannot be truncated from the initial tainted detention as the whole preventive legislation is viewed as one overarching transaction since each detention order is premised upon one another. That, is not applicable to the situation of the applicant here.

[33] The Federal Court then went on to decide that it would be different in a case where there is a formal charge preferred against the applicant. At paras 96–98, it was held that the unlawful preventive detention can then be clinically or surgically excised:

> In arriving at the conclusion, Augustine Paul FCJ relied, inter alia, on the textbook by RJ Sharpe entitled *The Law of Habeas Corpus* (2nd Ed) more particularly the excerpt at pp 180 to 181 of the book. It is necessary to read the passage in Sharpe with care. This is because the entire passage in the textbook relied upon in *Faizal Harris*, deals with the application for habeas corpus in the context of an arrest preceding ordinary criminal proceedings, where there is a formal charge preferred against the accused, which is to be followed by a full and fair trial. It does not contemplate, nor make any reference to preventive detention where there is no such opportunity afforded to a detainee, save as provided for in the legislation.
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> The point to be appreciated is that in the context of an arrest and detention as envisaged in Sharpe's textbook, the detainee, in effect the accused, who was illegally arrested, is detained pending a full criminal trial, where he is at liberty to present his defence, and is entitled to an open trial with all the necessary safeguards of the criminal justice system at the detainee's or accused's behest. Not so in the present set of appeals, nor those in *Zaidi Kanapiah* or *Goh*, where the relevant legislation is preventive legislation and where there is no prospect of an open criminal trial at all.
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> In the former circumstance, namely the context in the passage from Sharpe relied upon in Faizal Harris, the arrest can be clinically or surgically excised, as it were, from the rest of the trial, because the detainee or accused person proceeds with a full trial. Whereas the detainee under preventive detention legislation is not afforded such an opportunity ...

[34] To make a finding on whether the current remand faced by the applicant is tainted by the initial unlawful arrest under SOSMA, this court undertook to appreciate the analysis of the Federal Court's decision in *Lei Meng*.

[35] The position of the applicant here is hereby distinguished — as he is no longer in preventive detention. A charge has been preferred against him under s 130V of the Penal Code and he is given an opportunity for a fair trial. Thus here, the facts and circumstance here is the exemption that the Federal Court ruled where the initial unlawful arrest could be clinically or surgically excised — the applicant was arrested under s 4(1) of the SOSMA and detained under s 4(5) of the SOSMA. The application for a writ of habeas corpus is against that.

[36] There was no further detention under SOSMA as the applicant was charged under s 130V of the Penal Code and is currently in remand pending trial this month. This means the applicant is no longer under preventive detention of SOSMA. He is being accorded a fair open trial under our criminal justice system. He is given the right to be heard and present his defence.

[37] It is observed that the effect of the Federal Court's decision in *Lei Meng* pertaining to the 19 sets of appeals upon which detainees had already been released seems declaratory in nature. This is because although there is that declaration the habeas corpus applications ought to have been ordered, the effect of the remedy it brought (which is to physically release the 19 applicants) do not carry any physical difference to their position who are already free.

[38] Coming back to the case at hand here, the effect of this court's finding that the detention under SOSMA is unlawful wherein the writ of habeas corpus lies, may be inoperable. Though the applicant may have other remedies against the respondents in relation to that, the current remand of the applicant is no longer under the preventive law of SOSMA but as an accused person under the Penal Code, Criminal Procedure Code, to name a few.

[39] As such, the release and granting of freedom of the applicant must be through the legal channel now applicable under our Criminal Procedure Code and/or other appropriate laws, but not through a writ of habeas corpus, in terms of bail pending trial.

Application for habeas corpus dismissed.

Reported by K Selvaraju